No. 15269

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

F. C. HATHAWAY,
Appellee.

Brief for Appellee

Appeal from the United States District Court for the District of Oregon

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INTRODUCTION

As set forth in the agreed facts of the pre-trial order, appellee and the United States entered into a contract in March of 1952 for the sale of four sets of steel lock gates located at the old Government Locks, Cascade Locks, Oregon, which locks were below the level of the waters of the lake formed by Bonneville Dam on the Columbia River. The purchase price was $7,500, of which the United States received $1,500 in cash from appellee and later sold

the two gates which appellee was able to remove for $4,387.98, or a total of $5,887.98.

There was a controversy between the parties over removal and sale of the two sets of gates which appellee had taken from the water and appellee sued in the United States District Court, claiming breach of a modification of the contract and also asking relief as to one-half of the purchase price because of the mistake of the parties as to the amount of steel which it was possible to remove.

The Court denied the appellant's claim for damages for breach, but found that the parties were mutually mistaken as to the amount of steel which it was practicably possible to remove, that only one-half the amount of steel contemplated could be removed, that the parties understood that all of the steel could be removed, and that neither party intended that the contract would include steel which could not be so removed. Based on these findings, the Court concluded that the purchase price should be reduced by one-half, or to $3,750.00, and since the United States had already received $5,887.98, entered judgment for plaintiff in the sum of $2,137.98.

By this appeal, the United States challenges the Findings of the Court in a number of respects, but confines its argument to two points and it is to those that this Brief will be directed.

ARGUMENT

I.

A. The cases discussed by Appellant under this heading are cases in which the contractor was claiming damages from the Government for breach of an alleged warranty of quantity or quality and in which the courts denied recovery of such damages. This argument is best answered by the case of *Triple "A" Machine Shop* v. *United States*, 235 F. (2d) 626, which recognizes at page 631 the distinction, which appellant fails to observe, between an action for damages and a suit for equitable relief based upon mutual mistake:

> "Proper pleadings and proper evidence might have presented a case of mutual mistake. But we cannot remake the parties' contract on the pleadings and record made below."

This principle is recognized in *Howard* v. *Tettelbaum*, 61 Ore. 144, 120 Pac. 373, in which the parties were mutually mistaken as to the status of a particular item in the dissolution of partnership account. It was held that the contract of settlement could be reformed as to such amount.

In *Mineral Park Land Co.* v. *Howard*, 172 Cal. 289, 156 P. 458, the parties contemplated that certain land held gravel in quantities ready for use, but, in fact, it was removable only at prohibitive cost; in such circumstances it was held that performance should be excused.

In *Hollerbach* v. *United States,* 233 U.S. 165, a proposal prepared by the Government showed a filled dam as backed with broken stones, but cautioned bidders to visit the site and investigate and to ascertain the nature of the work, and the contract specifically disclaimed any warranty of the conditions as shown. The fill was not as shown. In that case, the Supreme Court held that the contractor was entitled to recover the loss which he suffered as a result of the error, notwithstanding the language of the contract.

B. There is substantial evidence to support the findings of the trial court to the effect that the parties were mutually and equally mistaken as to the amount of steel which could be removed.

The testimony of Hathaway himself was that he thought he "could get them out" (R. 37); based upon the diagram he was given (Tr. 30). The United States thought that they could be removed, since it offered the four sets of lock gates for sale. (Agreed Facts, R. 12, Bid Invitation, Ex. 1) and, according to the Government's witness Bixby, thought in 1952 that it would be economically feasible to remove the gates. (Tr. 89).

The United States understood that the upper set of the lower two sets of gates was in normal position (hydrographic survey, R. 65). The locks were under water and could not be seen (Tr. 3).

Both the United States and Hathaway were mistaken with respect to the lower two sets of locks. The testimony of the diver, Lewis Smith, whose testimony was not contradicted, was that the lower gates were sprung (R. 55), that it would have been dangerous to attempt to remove them, (R. 49, 53), that it was impossible to remove the lower gates with the equipment available, (R. 49), and that if asked, he would have informed the Army Engineers and Appellee in March of 1952 that it was impractical to remove the gates (R. 55, 59).

Since the Findings of Fact will not be set aside unless clearly erroneous, (Rule 17 F.R.C.*P.*), it appears that there is ample evidence from which the Court could make Findings to the effect that the parties were mistaken with respect to the steel which could be removed. Although appellant is not barred from raising the question on appeal, it is significant that the attorneys representing the United States in the trial of this case made no objection to or motion for amendment of the Findings entered.

C. The case of *Triple "A" Machine Shop* v. *U.S.*, 235 F. (2d) 626, contrary to appellant's interpretation, recognizes the existence of the very type of relief granted by the Court in this case. As we understand the Triple "A" case, the Court held that the District Court had properly entered a decree in favor of the United States in the plaintiff-con-

tractor's action to recover sums in addition to the contract price, but recognized that proper pleadings and proper evidence might have presented a case of mutual mistake. There is no contention in the case now before the Court that appellee was not seeking equitable relief by reason of mutual mistake.

II.

The Court's modifying the contract by dividing the purchase price in half was not speculative, but was based on the very practical observation that two of the four sets of lock gates sold were impossible of removal. It is our understanding that two is still one-half of four and the trial court apparently reached the same conclusion.

CONCLUSION

The United States had a very fair trial before a judge who observed the witnesses, and who carefully considered the identical arguments now repeated by the United States; his judgment should be affirmed.

Respectfully submitted,

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